



Information and Privacy  
Commissioner/Ontario  
Commissaire à l'information  
et à la protection de la vie privée/Ontario

# **ORDER MO-1400**

**Appeal MA\_000228\_1**

**Hamilton\_Wentworth Regional Police Services Board**



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## **NATURE OF THE APPEAL:**

The Hamilton-Wentworth Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all information obtained by the Police during a security clearance investigation conducted in relation to the appellant's application for employment with the Police. The Police located records responsive to the request and denied access to them, in their entirety, claiming that because of the application of sections 52(3)1 and 3 of the *Act*, the records fall outside the ambit of the *Act*. The appellant appealed the decision of the Police to deny access to the records.

During the mediation stage of the appeal, the appellant agreed to limit the scope of her request to include only a one-page document dated April 26, 2000 which summarizes the results of the background investigation of the appellant conducted by the Police.

I sought, and subsequently received, representations from the Police initially. These submissions were then shared with the appellant, in their entirety, along with a Notice of Inquiry. I did not receive any representations from the appellant in response to the Notice.

The sole record at issue in this appeal consists of a one-page document dated April 26, 2000 which summarizes the results of the background investigation.

## **DISCUSSION:**

### **JURISDICTION**

As noted above, the Police submit that, because of the operation of sections 52(3)1 and 3, the record remaining at issue falls outside the scope of the *Act*. If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, section 52(3) has the effect of excluding records from the scope of the *Act*.

Section 52(3) has no application outside the employment or labour relations context. Therefore, unless the institution establishes that the anticipated proceedings for which the records are being maintained arise in an employment or labour relations context, the records do not relate to "labour relations or to the employment of a person by the institution", and section 52(3) does not apply

[Orders P\_1545, P\_1563, P\_1564 and PO-1772]. I will address the application of section 52(3)3 to the record initially.

### **Section 52(3)3**

In order to fall within the scope of paragraph 3 of section 52(3), the Police must establish that:

1. the records were collected, prepared, maintained or used by the Police or on their behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Police have an interest.

### **Requirements One and Two of the Test**

I find that the record was prepared and used by the Police as part of the information-gathering and decision-making process surrounding the job competition in which the appellant was an unsuccessful applicant. This preparation and use was clearly in relation to various discussions, consultations and communications about the competition and the appellant's suitability for the advertised position. As such, I have no difficulty in finding that the first two requirements of the section 52(3)3 test have been satisfied with respect to this record.

### **Requirement Three of the Test**

The Police submit that the record relates to the appellant's application for employment and, as such, are employment-related. In Order P-1258, Assistant Commissioner Tom Mitchinson made the following finding with respect to similar records compiled in the course of a job competition:

I also believe it is self-evident that a job competition is an employment-related matter.

I agree with this conclusion and find that the record at issue in this appeal is about an employment-related matter within the meaning of section 52(3)3. I must now determine whether the Police "have an interest" in the subject matter of the record. In Order P-1258, Assistant Commissioner Mitchinson went on to define this term as follows:

The only real issue is whether or not a job competition is a matter in which the Ministry "has an interest".

In Order P-1242, I reviewed a number of legal sources regarding the meaning of this term, as well as several court decisions which considered its application in the context of civil proceedings. I concluded by stating:

Taken together, these [previously discussed] authorities support the position that an "interest" is more than mere curiosity or concern. An "interest" must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry's legal rights or obligations.

However, several more recent orders of this office have considered the application of section 65(6)3 of the provincial *Act* (and its municipal equivalent in section 52(3)3) in circumstances where there is no reasonable prospect of the institution's "legal interest" in the matter being engaged (Orders P-1575, P-1586, M-1128, P-1618, M-1161, MO-1193 and MO-1236). The conclusion of this line of orders has essentially been that an institution must establish an interest

that has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum or conclusion of a matter have all been considered in arriving at a determination of whether an institution has a legal interest in the records within the meaning of this section.

The Police make the following submissions with respect to the question of whether it has an interest in the employment-related matter which forms the subject matter of the record:

The background check forms part of the hiring process. This process is conducted according to the policies and procedures of this Police Service. The Police Service definitely has an interest in this process, as without the protection of confidentiality of the information obtained by the parties providing the information, the effectiveness of the background check would be in jeopardy. This Police Service must be able to exercise appropriate discretion in accessing employment applicants based on needs values and ethics of this organization.

The Police go on to add that:

By divulging the information obtained in the background check it would hinder the ability of the Police Service to screen possible applicants. As well, information that may be released could lead to violations of the Human Rights Code and quite possibly to civil litigation, not only against the Police Service but against individuals. This Police Service requires the ability to properly assess a prospective employee without subjecting persons who may provide information during a background check to repercussions.

Information contained in the background check may form the basis for a civil lawsuit or a Human Rights claim against the Institution. Although the Mediator in this case has assured the Police Service that the appellant does not want to sue the Hamilton Police Service or go to Human Rights, this is still a very real possibility and must be considered. Further, the civil litigation against the people with whom the Police Service spoke while conducting the background investigation is also at issue. This Police Service believes that the records at issue are definitely outside the scope of the *Act*.

In Order P-1258, Assistant Commissioner Mitchinson examined the legal obligations of a provincial institution with respect to its conduct of a job competition. He found that the institution, in its capacity as an employer, has a legal duty under the *Ontario Human Rights Code* to conduct its job competitions fairly and without discrimination. He held that:

However, I must also consider whether there are any external requirements which may bring job competition activities within the realm of “interest” as I have defined it in Order P-1242.

The *Ontario Human Rights Code* (the *Code*) applies to the Ministry, and includes the following sections which are relevant to the issue of the institution’s legal obligations and the possible effects of failing to observe them:

- 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.
- 9 No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part. [Note: section 5(1) is in “this Part” - i.e. Part I of the *Code*.]
- 41(1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,
- (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this *Act*, both in respect of the complaint and in respect of future practices; and
  - (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish.

From these sections, it is clear that, if an employer engages in discrimination in selecting an employee in a job competition, the employer has committed a direct breach of section 5(1) of the *Code*, and, as a party to a Board of Inquiry proceedings, could be liable in damages. Thus, in my view, it can properly be said, that the job competition process involves legal obligations which the employer must meet.

I discussed other provisions of the *Code* in Order P-1242, which dealt with whether the Ministry of Community and Social Services “had an interest” in records prepared or used in the context of an investigation conducted under the Ontario government’s Workplace Discrimination and Harassment Prevention policy (the WDHP). In that case I concluded that:

... if the Ministry fails to act on a harassment complaint, it risks potential liability under section 41(1) of the *Code*, while an effective WDHP investigation may reduce or preclude such liability. In my view, therefore, the WDHP investigation has the potential to affect the Ministry’s legal rights and/or obligations, and for this reason I find that the WDHP investigation is properly characterized as matter “in which the institution has an interest”.

Similarly, I find that if the employer conducts a proper job competition and avoids discriminatory practices, it would avoid liability under the *Code*, and therefore, on this basis, the competition is properly characterized as a matter “in which the institution has an interest”.

For these reasons, I find that job competitions are matters in which the Ministry “has an interest”, and Requirement 3 is met.

In my view, the Police have a similar legal obligation under the *Code* to conduct its job competitions fairly and without discrimination. In addition, I accept the argument put forward by the Police that they are required to carefully screen prospective employees, because of the nature of the work that police services in general perform. In my view, this ongoing obligation on the part of the Police gives rise to a legal interest in ensuring that potential employees are carefully chosen, including the use of background checks to assist in this determination of suitability. For these reasons, I find that job competitions, such as that involving the appellant, may properly be characterized as “employment-related matters” in which the Police “have an interest” for the purposes of section 52(3)3. Accordingly, I find that the third requirement of section 52(3) has been satisfied in the present appeal.

In summary, I find that the record at issue was prepared and used by the Police, in relation to discussions, consultations and communications about an employment-related matter in which the Police have an interest. All of the requirements of section 52(3)3 of the *Act* have thereby been established by the Police. None of the exceptions contained in section 52(4) are present in the circumstances of these appeals, and I find that the record falls within the parameters of section 52(3)3, and therefore, is excluded from the scope of the *Act*.

## **ORDER:**

I uphold the decision of the Police.

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Donald Hale  
Adjudicator

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February 21, 2001